UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY

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In re: TCI 2 HOLDINGS, LLC, et al., Debtors.	CHAPTER 11 Case No. 09-13654 (JHW) Jointly Administered Hearing Date & Time: August 27, 2009 at 2:00 p.m.

DONALD J. TRUMP'S OMNIBUS OBJECTION TO AD HOC NOTEHOLDER GROUP'S MOTIONS TO TERMINATE EXCLUSIVITY AND TO APPOINT AN EXAMINER

Donald J. Trump, by and through his undersigned counsel, in opposition to motions filed by the ad hoc group (the "Ad Hoc Investor Group") of proposed investors holding 8.5% Senior

Secured Notes due 2015 (the "Notes") requesting termination of exclusivity [Docket No. 530] (the "Exclusivity Motion") and appointment of an examiner [Docket No. 531] (the "Examiner Motion" and collectively, the "Motions"), hereby files this Objection and respectfully submits as follows:

PRELIMINARY STATEMENT[1]

On August, 3, 2009, the Debtors filed their plan of reorganization and disclosure statement, thereby concluding an exhaustive and comprehensive process – conducted entirely by disinterested officers, directors and professionals -- to identify the highest and best means by which to recapitalize their ailing business and to negotiate binding agreements in furtherance of the selected transaction. The Debtors, by the unanimous vote of their directors, *including several directors selected by the Debtors' 8.5% Noteholders*, chose to proceed with a recapitalization proposal submitted jointly by Mr. Trump, a substantial creditor, and Beal Bank, the holder of a first mortgage upon substantially all of the Debtors' assets and the only "in the money" stakeholder. The Debtors should be permitted to proceed with their plan in exclusivity.

The Ad Hoc Investor Group refers to the Debtors' plan as the "Insider Plan," as if inventing a catchy phrase will bestow credibility upon an utterly false (and concededly unproven) allegation. The undisputed record is clear that Mr. Trump is not an insider of the Debtors and was not an insider at any relevant time concerning the Debtors' plan, and has not served in any management position since the 2004 restructuring. As all must acknowledge, Mr. Trump and his daughter, Ivanka Trump, resigned from all positions with the Debtors (whether as officers, directors or otherwise) prior to the Debtors filing their Chapter 11 petitions. The Trumps did not vote on the resolutions approving the Chapter 11 filing, and Mr. Trump

[1] Capitalized terms used, but not defined, in this Preliminary Statement are ascribed definitions below.

abandoned substantially all his equity interests in the Debtors prior to bankruptcy and has appeared in these proceedings solely as a creditor.

When Mr. Trump expressed to the Debtors his desire to attempt to save the enterprise that bore his name, the response was clear and unambiguous: Not only would a Trump proposal have to be decidedly better for the estates than any other, but the Debtors would need to leave no stone unturned in seeking out alternatives. Mr. Trump was told, and readily accepted, that the Debtors, through their investment bankers, would solicit interest from any and all potential investors and acquirers and would be particularly solicitous of proposals from the Ad Hoc Investor Group as well.

Ultimately, Mr. Trump submitted a proposal jointly with Beal Bank some two months after the Debtors' Chapter 11 filing. Trump, Beal Bank and the Debtors engaged in extensive negotiations with regard to the proposal over a period of several additional months. Not only did Mr. Trump not enjoy an "inside track" with respect to these discussions, but the Debtors repeatedly obtained concessions and improvements from Trump and Beal Bank by referring to the possibility that they had other undisclosed offers to consider. During the negotiations, Mr. Trump raised the issue of a break-up fee and expense reimbursement if his proposal emerged highest and best. The Debtors refused, offering only the assurance that whichever bidder emerged victorious would have its proposal promoted under a plan during the Debtors' exclusive period.

Mr. Trump and Beal Bank thus played exactly by the rules promulgated by the Debtors as arms-length fiduciaries. And they got what they bargained for -- the consideration and ultimate approval by the Debtors' Board of Directors of their proposal *solely on the merits,* and the

opportunity to have the Debtors' Plan incorporating their proposal considered for confirmation by the Bankruptcy Court within the Debtors' period of exclusivity.

The Ad Hoc Investor Group, having failed to convince the Debtors of the alleged superiority of its plan, now emerges from the shadows as a disgruntled bidder with a cacophony of false and entirely unproven allegations designed to derail a process which, now that the Ad Hoc Investor Group has failed on the merits, it no longer endorses (it is noteworthy and revealing that while the Debtors were considering the Ad Hoc Investor Group's proposal several months ago, the Ad Hoc Investor Group readily consented to an extension of exclusivity). Without a shred of evidence, the Ad Hoc Investor Group has simply flung as much mud against the wall as its word processors could generate -- all of which allegations are disputed and will be proven false at the confirmation hearing -- hoping that a kernel of "cause" might emerge from its voluminous submission. But its effort must fail for at least the following reasons:

- Under the law of this District, the Ad Hoc Investor Group bears a "heavy burden" to establish cause to terminate exclusivity. That burden can only be carried with evidence, and the Ad Hoc Investor Group freely acknowledges that it has none (an acknowledgment which regrettably betrays the reckless disregard for the truth in the Ad Hoc Investor Group's pleadings).

- Even if some (or even all) of its protestations carried any evidentiary weight, the Ad Hoc Investor Group's argument, in a nutshell, boils down to a complaint that it has not been treated fairly in reorganization discussions coupled with a promise of a better plan. Such a complaint and accompanying promise universally have been found not to constitute "cause" for termination of exclusivity, but rather confirmation objections. As this Court acknowledged in denying a motion to terminate exclusivity in the Debtors' prior cases, where "issues have been raised regarding insider transactions, the independence of decision making on behalf of the debtors, the marketing efforts and the like, all of those, of course, will be considered in the context of the 1129 requirements."

- As more fully set forth in the Debtors' submission, the Debtors have undertaken a paradigmatic process to attract new capital and restructure existing obligations. They managed the process with skilled and highly experienced advisors (legal and financial) and disinterested officers and directors, and can point to extensive efforts to enfranchise the Ad Hoc Investor Group and other potentially interested parties. The

Debtors selected the Trump/Beal proposal on the merits and without any undue influence, and "market-tested" that proposal extensively. Not only does cause not exist to terminate, but the Debtors plainly have earned the statutory right to have their plan considered first.

- Termination of exclusivity would completely undermine the ability of a debtor to run a capital investment process and would be greatly unfair to Mr. Trump and Beal Bank. If disgruntled bidders are permitted to lay in the weeds and then launch a public attack on a process in which they came up short, it is hard to imagine any potential investor responding as it should when a debtor requests financing proposals. As to Trump and Beal Bank specifically, having undertaken enormous efforts and financial resources to put this deal together within the Debtors' exclusive period, their legitimate expectations should be honored.

- Finally, while this is not a hearing about the Ad Hoc Investor Group's competing plan (which, in any event is entirely discretionary and conditional and not "ready to go" as advertised), two points about that plan bear mention. First, the plan says something about the mysterious Ad Hoc Investor Group -- an entity that plainly has changed dramatically since its stale and facially defective Bankruptcy Rule 2019 statement was filed this past March (on the morning of a contested hearing). The Ad Hoc Investor Group is no longer (if it ever was) the vanguard of 8.5% Noteholders. Indeed, five of the purported "holders" from the Bankruptcy Rule 2019 statement are not listed among the investors. Today, the Ad Hoc Investor Group constitutes a group of hedge funds possibly willing to purchase up to 75% of the Debtors' reorganized equity for cash, with another 20% going to them as a "fee." The great unwashed 8.5% Noteholders who do not pony up their share of the purchase price are slated to receive on account of their claims a *de minimis* distribution. While largely irrelevant to the motion to terminate, the Ad Hoc Investor Group's plan speaks loudly about the out-of-the money residual interest of 8.5% Noteholders. Second, the Ad Hoc Investor Group's argument that "no prejudice" will result from a termination of exclusivity, an argument which, in any event, is not a substitute for "cause," is entirely false. On this point, we submit a short section of our opposition under seal.

In addition to seeking to terminate exclusivity, the Ad Hoc Investor Group seeks the appointment of an examiner to "investigate" three issues, including the plan process. Counsel for the Ad Hoc Investor Group already has informed the Court cavalierly that appointment is mandatory and the only issue is the scope of the investigation. Counsel is incorrect. The Court is required to find the requested investigation "appropriate" under section 1104 before it can order relief, and there is nothing appropriate about the request:

- A "tactical" request for an examiner made at the time the confirmation process begins is frowned upon and considered inappropriate. Given the historical nature of two thirds of the stated issues and the fact that the Ad Hoc Investor Group has only now sought examination as part of a plan fight, the Ad Hoc Investor Group's motives are all too transparent and doom the motion to fail.

- An "examination" of the plan process will simply replicate the Ad Hoc Investor Group's attempts to oppose confirmation, but instead at the expense of the estates. This is the fourth time that the Ad Hoc Investor Group has attempted to impose its professional costs upon the estate -- first, as part of the cash collateral budget, second, when the Ad Hoc Investor Group, after informing the Court that it did not seek official status, nonetheless wrote to the United States Trustee and unsuccessfully requested the appointment of an official 8.5% Noteholders committee, third, with the proposal of a competing plan that provides for the estates to pay the Ad Hoc Investor Group's fees and expenses, and finally with the requested examination.

- The requested examiner has the potential to create administrative expenses for the estates that will be borne by Mr. Trump and Beal Bank if the Debtors' plan is confirmed, but which may substantially exceed the administrative expenses projected in connection with the transaction.

Apart from the foregoing fatal defects with respect to the Motions, the Ad Hoc Investor Group regrettably has engaged in conduct which makes it unworthy of judicial intervention, as catalogued in the last section of this submission.

For these reasons, and those set forth below, the Court should deny the Motions.

BACKGROUND

A. The 2004 Bankruptcy Cases.

1. On November 21, 2004, Trump Hotels & Casino Resorts, Inc., together with 28 affiliates and subsidiaries, including Trump Entertainment Resorts Holdings, L.P. ("TER Holdings") and Trump Entertainment Resorts, Inc. ("TER") -- each a Debtor in the current Bankruptcy Cases, filed voluntary Chapter 11 petitions in this Court (the "2004 Bankruptcy Cases"). On April 5, 2005, this Court entered an order confirming the Second Amended Joint Plan of Reorganization in the 2004 Bankruptcy Cases (the "2004 Plan").

2. Pursuant to the corporate governance documents ancillary to the 2004 Plan, Noteholders are empowered to designate at least five directors on the TER board. Indeed, the current, six member TER board includes three directors designated by Noteholders, one member mutually appointed by the Noteholders and Mr. Trump, and the CEO, Mr. Juliano, who was selected by the Noteholder-designee dominated board and added to the board by the Noteholders. Not only is there nothing to the Ad Hoc Investor Group's contention that the Debtors are controlled by Mr. Trump, *but the Debtors are run by directors a majority of which were selected by 8.5% Noteholders* !

B. Mr. Trump Abandons Substantially All Interests In the Debtors.

3. In December, 2008, due to the Debtors' failure to make an interest payment to the Noteholders, the Debtors engaged in extensive negotiations with an ad hoc group of Noteholders, represented by the same professionals as the Ad Hoc Investor Group and consisting of some of the same holders. The Debtors and that ad hoc group entered in various forbearance agreements and extensions.

4. On February 13, 2009, Mr. Trump abandoned his 23.506% partnership interest in TER Holdings. Prior to that action, Mr. Trump and Ivanka Trump resigned from TER's board of directors. Accordingly, as of the Petition Date (defined below), Mr. Trump and Ivanka Trump held no direct partnership interests in TER Holdings [2] and no board seats, and had never held any management positions since the 2004 reorganization. Had Mr. Trump not abandoned his partnership interest, his consent would have been required for the Debtors' 2009 Chapter 11 filing. The Debtors filed for Chapter 11 without seeking or obtaining Mr. Trump's consent. While the Ad Hoc Investor Group levels unfounded accusations about the abandonment, the

[2] ACE Entertainment Holdings, Inc., which is wholly owned by Mr. Trump, held as of the Petition Date, and still holds, approximately 0.00725% of the partnership interests of TER Holdings.

Debtors' tax professionals have considered the issue and formed the view that it will cause no additional costs to the Debtors.

C. The 2009 Bankruptcy Cases.

5. On February 17, 2009 (the "Petition Date"), the Debtors commenced these Chapter 11 bankruptcy cases (the "Bankruptcy Cases"). No trustee or examiner has been appointed and the Debtors remain in possession of their assets and continue management of their businesses as debtors in possession.

6. No official committee of unsecured creditors or other official committee has been appointed in these Bankruptcy Cases. While counsel for the Ad Hoc Investor Group represented to the Court at the February 19, 2009 hearing that the group would not seek status as an official committee,[3] it did do so in July, 2009. That request was denied by the U.S. Trustee.

7. The Ad Hoc Investor Group has been intimately involved in the Bankruptcy Cases. It has litigated adequate protection issues, appeared at numerous hearings, and weighed in on various issues throughout these cases, including with respect to critical vendor payments.

8. The Debtors' initial exclusive period to file a plan expired on June 17, 2009.

9. On June 16, 2009, the Court entered an Order extending the Debtors' exclusive periods to file a plan and to solicit acceptances through August 3, 2009 and October 1, 2009, respectively. [Docket No. 397]. The Ad Hoc Investor Group consented to that extension. (Exclusivity Motion ¶ 17).

D. The Plan Negotiations.

10. As more fully detailed in the Debtors' opposition to the Exclusivity Motion, starting early in their Bankruptcy Cases, the Debtors, working through their financial advisor, Lazard Frères & Co., LLC ("Lazard"), ran a process to attract new capital and restructure

[3] See Transcript of February 19, 2009 hearing [Docket No. 89] at 90:1-21.

existing obligations. Lazard and Weil, Gotshal & Manges LLP ("Weil"), both highly skilled and experienced firms, managed that process to ensure a full and fair opportunity for all parties to present proposals. Lazard took extensive efforts to enfranchise the Ad Hoc Investor Group and other potentially interested parties.

11. Based on Lazard's marketing efforts and the limited interest in the market place, Lazard informed the Debtors that the only proposals for investing in the Debtors were from Mr. Trump and certain members of the Ad Hoc Investor Group. (Debtors' Disclosure Statement, IV.D.). Between April and August 2009, the Debtors and Lazard had numerous discussions with the parties regarding potential investments in the Debtors.

12. Ultimately, Mr. Trump presented a proposal to Beal Bank that was then accepted by the Debtors' senior secured lender (the "Beal / Trump Proposal") and thereafter presented to the Debtors' board of directors for their consideration. Mr. Trump, Beal Bank and the Debtors engaged in extensive negotiations with regard to that proposal over a period of many months. Not only did Mr. Trump not enjoy an "inside track" with respect to these discussions, but the Debtors repeatedly obtained concessions and improvements from Mr. Trump and Beal Bank by referring to the possibility that they had other undisclosed offers to consider. During the negotiations, Mr. Trump raised the issue of a break-up fee and expense reimbursement if his proposal emerged highest and best. The Debtors refused, offering only the assurance that whichever bidder emerged victorious would have its proposal promoted under a plan during the Debtors' exclusive period.

13. Mr. Trump and Beal Bank acted scrupulously within the bidding parameters promulgated by the Debtors as arms-length fiduciaries. And they got what they bargained for -- the consideration and ultimate approval by the Debtors' board of directors of their proposal

solely on the merits, and the opportunity to have the Debtors' plan incorporating their proposal considered for confirmation by the Bankruptcy Court within the Debtors' period of exclusivity. On or about July 22, 2009, the Debtors' board of directors, majority of which was appointed by 8.5% Noteholders, voted to approve the Beal / Trump Proposal finding it was higher and better than the Ad Hoc Investor Group's proposal (the "AHG Proposal"). (Disclosure Statement, XI. B.; Debtors' opposition to the Exclusivity Motion).

E. The Debtors' Plan.

14. On August 3, 2009, the Debtors filed their *Joint Plan Under Chapter 11 of the Bankruptcy Code* (the "Debtors' Plan"), along with a disclosure statement (the "Disclosure Statement") in support thereof. [Docket Nos. 518, 519]. The Debtors' Plan was filed prior to the expiration of their exclusive period to file a plan and, absent termination, exclusivity continues by statute until at least October 1, 2009.

15. The Debtors' Plan embodies the terms set forth in the Beal / Trump Proposal including, without limitation, the following material provisions: (a) continued financing from Beal Bank with a replacement facility, containing an extended maturity through 2020, and lower interest payments, (b) $100 million investment by Mr. Trump and Beal Bank, in exchange for all equity of reorganized TER Holdings, and (c) because of the unfortunate deterioration of asset values in Atlantic City, no distribution to general unsecured creditors, including the Noteholders, who are out of the money.

F. The Exclusivity Termination Motion.

16. The Ad Hoc Investor Group asks the Court to terminate exclusivity so it can file its own plan (the "AHG Proposed Plan"). Accompanying its exclusivity termination motion, filed under seal, are copies of the AHG Proposed Plan, a proposed disclosure statement, the

"Noteholder Backstop Commitment Letter" (the "AHG Backstop Agreement"), and the "Coastal Development, LLC Letter of Intent to Purchase Trump Marina" (the "Coastal LOI").

17. The material terms of the AHG Proposed Plan include: (a) nonconsensual cram-down of Beal Bank at unstated "below market" terms with a $75 million pay-down, (b) issuance of new common stock with a *de minimis* distribution to general unsecured creditors (including 8.5% Noteholders), and nearly all new common stock being issued through a rights offering requiring creditors to pay for shares, and (c) a backstop of the rights offering by the Ad Hoc Investor Group in exchange for a hefty backstop fee of 2,000,000 shares of common stock (20% of shares issued under that plan), which, using the subscription price in the AHG Backstop Agreement, constitutes a fee valued as high as $46,660,000[4] (or 26.7% of the $175,000,000 backstopped).

G. The Examiner Motion.

18. The Ad Hoc Investor Group requests appointment of an examiner pursuant to 11 U.S.C. § 1104(c) to investigate (a) the Debtors' proposal of the Debtors' Plan, (b) the Marina sale and related Coastal litigation, and (c) Mr. Trump's abandonment of his TER Holdings partnership interests and the tax and other financial implications thereof for the Debtors.

19. For the reasons set forth below, there is no basis under the Bankruptcy Code or other applicable law to terminate exclusivity or to appoint an examiner. The Motions should be denied.

[4] By virtue of the backstop fee the effective price of each share for the Ad Hoc Investor Group is between $16.15 and $18.42 (a price heavily discounted relative to other 8.5% Noteholders should those other Noteholders elect to participate), assuming *de minimis* additional unsecured claims, and depending on the level of subscription.

OMNIBUS OBJECTION

I. THE AD HOC INVESTOR GROUP HAS NOT MET ITS "HEAVY BURDEN" TO SHOW CAUSE TO TERMINATE EXCLUSIVITY.

20. Congress vested each debtor with a period of at least 120 days, subject to extension, wherein it enjoys the exclusive right to file and solicit a plan. See 11 U.S.C. § 1121(b), (c). "The exclusivity period affords the debtor the opportunity to negotiate the settlement of its debts by proposing and soliciting support for its plan of reorganization without interference-in the form of competing plans-from its creditors or others in interest." In re Geriatrics Nursing Home, Inc., 187 B.R. 128, 131 (D.N.J. 1995).[5] The Bankruptcy Code provides that "the court may for cause" terminate exclusivity. 11 U.S.C. § 1121(d)(1). "Cause" is not defined by statute. Rather, case law has shaped its definition in this context. See In re Geriatrics Nursing Home, Inc., 187 B.R. at 132.

A. The Ad Hoc Investor Group Has The "Heavy Burden" Of Proving Cause To Terminate Exclusivity.

21. Where a party asks a court to terminate exclusivity, the burden to show "cause" lies with that movant. See Feb. 23, 2005 Hrg. Tr., 104:2-5 (terminating exclusivity "requires that the burden for establishing that kind of relief rests with the movant and would, of course, disturb the balance arrived at by Congress"). Indeed, "[a] party in interest which seeks to establish 'cause' to terminate the exclusivity period bears a **heavy burden**." In re Geriatrics Nursing Home, Inc., 187 B.R. at 132 (emphasis added).

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[5] In other words, exclusivity arises from "a delicate balance arrived at by Congress as an opportunity for a debtor on the one hand to negotiate with creditors and have the exclusive right to propose a plan, versus on the other side a protection of the interest of creditors and their opportunity to propose a plan." In re THCR / LP Corporation, et al., Case No. 04-46898 (Bank. D.N.J. 2005), Transcript of February 23, 2005 Hearing (herein, the "Feb. 23, 2005 Hrg. Tr."), 103:16-22.

22. The burden is so high that courts very seldom terminate exclusivity. See In re Lehigh Valley Prof'l Sports Club, Inc., 2000 WL 290187 at *4 (Bankr. E.D. Pa. March 14, 2000) (observing that "[i]n the 22 years since the exclusivity provision was promulgated in the Bankruptcy Reform Act of 1978, there have been only two reported cases that permitted shortening the exclusivity period").[6]

23. Realizing the dearth of cases granting the relief sought, the Ad Hoc Investor Group cites to cases in which courts have denied motions to extend exclusivity. (Exclusivity Motion ¶ 24). But, those cases are critically different in that the burden there rested with the party seeking extension, while here the "heavy burden" rests with the Ad Hoc Investor Group, as movant.

B. The Ad Hoc Investor Group Provides No Evidence In Support Of The Relief Sought.

24. The Ad Hoc Investor Group cannot meet its "heavy burden" without evidence. To meet its burden, the Ad Hoc Investor Group must demonstrate "cause" by a preponderance of the evidence. See In re Dow Corning Corp., 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997) (applying preponderance standard to exclusivity termination request). The Ad Hoc Investor Group has not and cannot carry its burden, having announced to the Court and confirmed in writing to the parties that it does not intend to present evidence. See Exhibit A (August 14, 2009 Letter from Curtis C. Mechling).

25. And, of course, statements of counsel in pleadings are not evidence. See In re Mendel, 351 B.R. 449, 451 (Bankr. S.D. Tex. 2006) ("It is unacceptable for a party who has the

[6] Citing In re Crescent Beach Inn, Inc., 22 B.R. 155 (Bankr. D.Me. 1982) and In re Texas Extrusion Corp., 68 B.R. 712 (N.D. Tex. 1986), aff'd, 844 F.2d 1142 (5th Cir. 1988) (in both of which the court terminated exclusivity due to acrimony among the parties and bitter feuding leading to delays and costs).

burden of proof to not produce a single witness or enter any exhibits; allegations in pleadings and oral statements from counsel at a hearing are not a substitute for actual evidence.").

26. The Ad Hoc Investor Group's attack on the plan process consists entirely of false and unsubstantiated legal arguments, and nothing more. See e.g., (Exclusivity Motion ¶ 15) (without pointing to any specific inquiries or information sought, accusing the Debtors of having "been sparing in their communications . . . and barely respond[ing] to inquiries and information requests from Noteholders"); (Id., n. 7) (without pointing to any dates, persons or means of request, alleging that the Debtors declined a request to meet with the Ad Hoc Investor Group); (Id., n. 8) (without identifying the parties involved or specific discussions, alleging that "[p]rospective investors have reported that, despite their requests, they have been unable to obtain marketing materials or due diligence information from the Debtors and their financial advisors."). The Ad Hoc Investor Group cannot rely on these or any other unsupported statements to meet its burden of proof.

27. Realizing that it has no evidence to support its argument of an improper process, the Ad Hoc Investor Group relies on conclusory statements claiming that because it believes the AHG Proposal is better, then the Debtors must have been acting in a flawed manner. See (Exclusivity Motion ¶ 31). These statements cannot carry the Ad Hoc Investor Group's burden, and ignore the extensive and thorough process run by the Debtors through Lazard and Weil.

C. Another Plan Or An Unfair Plan Process Are Not "Causes" to Terminate Exclusivity.

28. Even if the Ad Hoc Investor Group's unsupported arguments carried any evidentiary weight, it has not met its burden because alleged flaws in the plan process and the

existence of a potential alternative plan, do not constitute cause to terminate exclusivity.[7] See In re Geriatrics Nursing Home, Inc., 187 B.R. at 134; see also In re Adelphia Communications Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) ("displeasure with a plan on file . . . is not a basis for terminating exclusivity. Nor, without more, is creditor constituency unhappiness with a debtor's plan proposals, with or without a formal plan on file.").

29. The facts of In re Geriatrics Nursing Home, Inc. -- the only published case in this District to examine what constitutes cause for exclusivity termination -- are strikingly similar. There, secured creditors requested termination of exclusivity because "they were each prepared to tender more favorable plans of reorganization." 187 B.R. at 133. The Bankruptcy Court "determined that these alternative plans ought to be entertained" and terminated exclusivity. Id. However, Judge Politan reversed on appeal holding that the creditors failed to meet their "heavy burden" to show cause to terminate exclusivity. The court explained that

> Where the only grounds suggested by a movant for termination of the exclusivity period in order that it may file an alternative plan, are, first, that it has been treated unfairly because it has been excluded from negotiations being conducted under the aegis of a mediator, and, second, that the filing of a competing plan will expedite the prompt resolution of these bankruptcy cases, this court is unable to find the cause required by § 1121(d).

Id. at 132 quoting In re Eagle-Picher Industries, Inc., 176 B.R. 143, 147 (Bankr. S.D. Ohio 1994). Therefore, the court held: "This Court is not satisfied that statements made by creditors and parties in interest that they were prepared to offer more favorable plans if the court were to terminate the exclusivity period constitutes sufficient cause to cut short the debtor's window of opportunity opened by Congress." Id. at 134.

[7] Counsel for the Ad Hoc Investor Group is well aware of this standard. In the Pliant Corp. bankruptcy case pending in the District of Delaware, Mr. Hansen of the Stroock firm, representing an ad hoc noteholder group, explained (correctly so) that "it is well settled that the real basis for the Motion -- that the Official Committee hopes this Court will permit someone to file an alternative plan of reorganization more to its liking -- will not constitute cause to terminate exclusivity" and cited to In re Geriatrics Nursing Home, Inc. (emphasis in original).

30. While the Ad Hoc Investor Group would have the Court believe that it is somehow specially situated to seek termination of exclusivity because it proposes an alternative plan, there is nothing unique in its request. As this Court observed, denying similar relief in the 2004 Bankruptcy Cases, "the fact that there may be other options, that there may be a better plan, that if we get to confirmation and the confirmation of the plan is denied, that we will be at square one and will have to understand the direction to pursue in terms of how to reorganize the debtors, all of that is understood and that occurs in every case, if the plan proposed by a debtor during exclusivity is not confirmed." Feb. 23, 2005 Hrg. Tr., 110:1-10.

31. Finally, the Ad Hoc Investor Group has no inherent right to propose a competing plan during exclusivity. As explained In re Eagle-Picher Industries, Inc., where the court denied a similar request:

> The view of the UCC that it should in fairness be allowed to file an alternative plan because it is entitled to a level playing field does not lead us to alter our view that the UCC has failed to show cause for termination of the exclusivity period. The UCC argued that a level playing field was what was contemplated by the Bankruptcy Code. That is simply not so. The concept of an exclusivity period in favor of a debtor, a consideration at the heart of the Bankruptcy Code, on its face contradicts the notion that parties in a Chapter 11 bankruptcy case be given an equal opportunity to seek confirmation of a plan.

176 B.R. at 147.

32. The Ad Hoc Investor Group's unproven contentions that a better plan exists and the process was flawed, even if true (which they are not), do not give cause to terminate exclusivity. Those arguments amount to confirmation objections properly addressed at the confirmation hearing for the Debtors' Plan.

33. The Bankruptcy Code affords the Ad Hoc Investor Group procedures to object to adequacy of disclosure and to confirmation. See 11 U.S.C. § 1125, 1129. Issues relating to the

plan process including the allegations regarding unfairness and bias in the Motions are covered by the "good faith" requirements of section 1129(a)(3) and will need to be addressed at confirmation. Indeed, the Ad Hoc Investor Group recognizes that its issues are premature. It concedes in the Exclusivity Motion that "**now is not the time** to adjudicate confirmation objections to either the Insider Plan or the Noteholder Plan." (¶ 34) (emphasis added).

34. Just as in the 2004 Bankruptcy Cases, "issues have been raised regarding insider transactions, the independence of decision making on behalf of the debtors, the marketing efforts and the like, all of those, of course, will be considered in the context of the 1129 requirements." Feb. 23, 2005 Hrg. Tr., 110: 16-20.

D. The Debtors' Plan Is Not An Untested New Value Plan And This Confirmation Objection Does Not Give Cause To Terminate Exclusivity.

35. The Ad Hoc Investor Group claims that the Debtors' Plan is a "new value" plan that has not been "market tested" which, it contends, mandates terminating exclusivity. (¶ 28). That is a confirmation objection which is premature now and irrelevant to exclusivity. Also, the Debtors' Plan plainly is not a "new value" plan and has been thoroughly "market tested".

36. The absolute priority rule precludes "cram-down" of unsecured claims if junior interests "receive or retain under the plan on account of such junior . . . interest any property . . ." 11 U.S.C. § 1129(b)(2)(B)(ii). Where applicable, the "new value" exception insulates distributions made to junior interest holders from the absolute priority rule by deeming them made not "on account of" those interests, but rather in exchange for the new value provided.

37. There is no absolute priority issue in the Debtors' Plan because no class junior to unsecured creditors will receive any distribution "on account of" those interests. Beal Bank does not hold any junior interests, indeed it is senior to the unsecured claims. Similarly, Mr. Trump is

not getting a distribution "on account of" equity.[8] Both Beal Bank and Mr. Trump are getting new equity for clearly disclosed reasons: they are contributing $100,000,000 to the Debtors, Mr. Trump is providing valuable licensing rights and business opportunities, and Beal Bank is agreeing, as part of the Debtors' Plan, to extend maturity of its loan and to a below market interest rate.

38. Regardless, even if the Debtors' Plan were deemed to make a distribution on account of existing equity, that does not violate the absolute priority rule because the value has been fully "market tested" and, thus, meets the requirements of Bank of America National Trust and Savings Assoc. v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S.Ct. 1411 (1999).

39. In 203 North LaSalle, the Supreme Court, in requiring that "new value" plans be market tested, contemplated utilizing a competitive bidding process. See 526 U.S. at 458 (making clear that nothing in its opinion precluded a "market test" being "satisfied by a right to bid for the same interest sought by old equity."). Here, the competitive bidding process run by the Debtors and Lazard confirms that the bid value was sufficiently tested. As the Third Circuit explained In re PWS Holding Corp., "[w]hat doomed the plan in 203 North LaSalle was not that old equity received property under the plan, but the 'exclusivity' that old equity enjoyed, which suggested that old equity might have obtained the interest for less than someone else might have paid." 228 F.3d 224, 239-40 (3d Cir. 2000). Neither Beal Bank nor Mr. Trump enjoyed exclusivity in pricing new equity under the Debtors' Plan. That price was set by the Debtors with Lazard's market testing.

[8] Mr. Trump asserts a substantial claim against the Debtors as set forth in his proofs of claim filed May 28, 2009. To the extent his "capacity" in bidding on new equity is even relevant, Mr. Trump was acting as a creditor as he holds no equity interests in the Debtors.

40. That the Ad Hoc Investor Group participated in the process, as explained fully in the Debtors' opposition papers, further confirms the price was not set "exclusively" by Beal Bank or Mr. Trump. See In re PWS Holding Corp., 228 F.3d at 239 ("Huff itself made several offers for the claims, which were considered and rejected, demonstrating that KKR enjoyed no exclusivity of opportunity.").

41. The Ad Hoc Investor Group incorrectly argues that the Debtors' plan exclusivity amounts to Mr. Trump's exclusive control over the bidding process. (Exclusivity Motion ¶ 26).[9] That argument, even if true (and it is recklessly false), has been rejected in this Circuit. In In re PWS Holding Corp., the Third Circuit held at that "to read 203 North LaSalle so broadly would be to undermine the express statutory provision for exclusivity in § 1121(b) . . . This we decline to do." 228 F.3d at 239, n. 11; see also In re Zenith Electronics, 241 B.R. 92, 106 (Bankr. D. Del. 1999) ("To do so would require in all cases that a debtor be placed 'on the market' for sale to the highest bidder. Such a requirement would eliminate the concept of exclusivity contained in section 1121(b) and the broad powers of the debtor to propose a plan in whatever format it desires.").

[9] The Ad Hoc Investor Group's citations of law on this point are inaccurate and inapposite. In Global Ocean Carriers, Ltd., the court did not terminate exclusivity, but rather denied confirmation observing that the "market place test" "can be achieved by either terminating exclusivity and allowing others to file a competing plan or allowing others to bid for the equity (or the right to designate who will own the equity) in the context of the Debtors' Plan." 251 B.R. 31, 49 (Bankr. D. Del. 2000). Here, the Ad Hoc Investor Group has bid for the equity and thus the value was market tested. Situation Mgmt. Sys., Inc., is inapposite because, there, as the Ad Hoc Investor Group correctly points out, the court observed that because the debtors had opened up bidding in their plan, they had in effect waived exclusivity. 252 B.R. 859, 865 (Bankr. D. Mass. 2000); see Official Committee of Unsecured Creditors of New World Pasta Co. v. New World Pasta Co., 322 B.R. 560, 569 (M.D. Penn. 2005) (upholding DIP financing agreement by distinguishing Situation Mgmt. where the agreement did not provide the lender a right to purchase equity and therefore did not waive exclusivity).

E. The Plan Process Was Entirely Fair And Appropriate And The Ad Hoc Investor Group Provides No Evidence Showing Otherwise.

42. While issues of fairness in the plan process are irrelevant to finding cause to terminate exclusivity, even if relevant here, the plan process was run in a fair and appropriate fashion, and the Ad Hoc Investor Group provides no evidence to the contrary.

43. The Debtors, in their opposition papers, provide a detailed recitation of the history of discussions, meetings, and negotiations among the parties, including specific dates of events and parties present. That narrative shows an irrefutable, well-documented, robust process, in which the Ad Hoc Investor Group actively participated. The Debtors managed in an independent manner that process with skilled and highly experienced advisors. The Debtors selected the Beal / Trump Proposal on the merits and without any undue influence, and "market-tested" that proposal extensively.

44. Termination of exclusivity, especially based on arguments without evidence, would completely undermine the ability of a debtor to run a capital investment process and would be greatly unfair to Mr. Trump and Beal Bank. Mr. Trump and Beal Bank undertook enormous efforts and financial resources to put this deal together within the Debtors' exclusive period. Their legitimate expectations should be honored.

F. The Ad Hoc Investor Group Acts To Promote The Interests Of Would Be Investors, Not The Estates Or Any Creditors.

45. While the merits (or lack thereof) of the AHG Proposed Plan are wholly irrelevant to the Motions and to exclusivity, the Court and parties should be informed of the following, lest be further misled by the Ad Hoc Investor Group:

- While the Ad Hoc Investor Group purports to represent the interests of all Noteholders and creditors, it does not. (Exclusivity Motion, ¶¶ 2, 33). The economics of the AHG Proposed Plan demonstrates that it is pursuing a business prospect for certain potential hedge fund investors, who happen to coincidentally hold Notes. Indeed, five of the purported "holders" listed on the Bankruptcy Rule 2019

statement are not listed as backstop parties. The Ad Hoc Investor Group proposes that unsecured creditors pay to receive 75% of the equity distributed under the plan, while its group members receive 20% of the equity as a "backstop fee." Noteholders and other unsecured creditors who do not pony up their share of the purchase price are slated to receive on account of their claims a *de minimis* distribution, while the Ad Hoc Investor Group reaps their exorbitant fee.

- The Ad Hoc Investor Group characterizes its plan as "a definitive proposal with committed financing," but that is not the case. (Exclusivity Motion, n. 11). The so-called "committed financing" contained in the AHG Backstop Agreement, contains various outs that the potential investors can exercise to be relieved of obligations. For instance, the potential investors have no actual obligations unless a requisite group (66 2/3%) approves, in writing, their plan and the confirmation order. AHG Backstop Agreement § 5(b). Moreover, the potential investors can terminate their purported commitment if the requisite holders decide to support another plan of reorganization. Id. § 8(a)(viii). The AHG Proposed Plan provides further rights for potential investors to walk away from the deal for any reason and at their sole discretion. See AHG Proposed Plan § 12.7 ("The Ad Hoc Committee reserve [sic] the right to revoke or withdraw the Plan prior to the Effective Date. If the Ad Hoc Committee takes such action, the Plan shall be deemed null and void."); § 9.1(a) (the plan cannot go effective unless all relevant transaction documents including the "Marina Sale Agreement" and "Amended Organizational Documents" are "in form and substance satisfactory" to the Ad Hoc Investor Group).

- Just as the term "Insider Plan" is a clear misnomer, so too is "Noteholder Plan." The plan is not proposed or supported by the Noteholder class. Rather, it is promoted by would-be investors seeing a business opportunity upon terms deemed by the Debtors to be inferior, who happen to be Noteholders.

G. Lifting Exclusivity Is Not A "No Harm" Proposition; Real Harm Will Befall The Debtors And Their Estates.

[SECTION FILED UNDER SEAL].

II. THE AD HOC INVESTOR GROUP FAILS ITS BURDEN IN THE EXAMINER MOTION BECAUSE IT IDENTIFIES NO TOPICS APPROPRIATE FOR EXAMINATION.

46. The Ad Hoc Investor Group's request for an examiner is purely strategic and intended for litigation leverage, and thus improper and should not be granted. "[A] creditor cannot use the provision to disrupt the proceedings." In re Schepps Food Stores, Inc., 148 B.R. 27, 30 (S.D. Tex. 1992) (affirming bankruptcy court's rejection of request for appointment of examiner during plan approval process based on "ample support in the record to conclude that

[the creditor's] interest in the appointment of an examiner is a tactic to prevent confirmation, rather than to investigate bad faith allegations.").

47. Moreover, the Ad Hoc Investor Group has known about two of the issues it wants investigated for months, but only asks for an examiner now as a tactical maneuver. See In re Bradlees Stores, Inc., 209 B.R. 36, 39 (Bankr. S.D.N.Y. 1997) (by waiting many months to make a request for an examiner, the movants were "barred by their own inaction" from seeking the appointment of an examiner); In re Schepps Food Stores, Inc., 148 B.R. at 31 ("By its late action, Smith has waived its right to an examiner.").[10]

48. While the Ad Hoc Investor Group claims that 11 U.S.C. § 1104(c) provides a mandatory basis for appointment for an examiner, that statute clearly limits the scope of examination to what is "appropriate." 11 U.S.C. § 1104(c). The Ad Hoc Investor Group, as movant, has failed to meet its burden here by not identifying any topic appropriate for examination.

49. **Examination of the Plan Process is Inappropriate**. An "examination" of the plan process will simply replicate the Ad Hoc Group's attempts to oppose confirmation, but instead at the expense of the estates, and is inappropriate. The Ad Hoc Investor Group, upset that the Debtors chose another proposed plan over its own, accuses the Debtors of bad faith. 11 U.S.C. § 1129(a)(3) requires, for confirmation, that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129. As this Court held in the 2004 Bankruptcy Cases, "Indeed, issues have been raised regarding insider transactions, the independence of decision making on behalf of the debtors, the marketing efforts and the like, all of those, of course, will be considered in the context of the 1129 requirements." Feb. 23, 2005

[10] Even the leading case for the view that the appointment of an examiner under section 1104(c) is mandatory for cases with qualifying debt over $5 million specifically held that it was not deciding the issue of whether "last-minute demands for an examiner" constitute abuse. In re Revco D.S., Inc., 898 F.2d 498, 501 (6th Cir. 1990).

Hrg. Tr., 110: 16-20; see also In re Schepps Food Stores, Inc., 148 B.R. at 31 ("Smith's allegations are little more than the normal objections that it will make at the confirmation hearing.").

50. **Examination of the Marina Sale and Litigation is Inappropriate**. The Ad Hoc Investor Group's request to examine the "facts and circumstances of the Florida Litigation, the Marina Sale Agreement and the related Coastal Adversary Proceeding" is similarly inappropriate. This is another attempt to saddle the estates with the costs of the Ad Hoc Investor Group's own confirmation objection. The Ad Hoc Investor Group concedes as much: "Before any disclosure statement can be approved and before any confirmation proceedings can occur on the Insider Plan, creditors of the Debtors' estates and this Court need to know the truth behind the countless fraud allegations swirling around the Florida Litigation, the Coastal Adversary Proceeding and the related sale of the Trump Marina." (Examiner Motion ¶ 28). Moreover, an examination of this topic is highly inappropriate because of ongoing litigation among the parties, especially given that Coastal, which has signed a letter of intent with the Ad Hoc Investor Group, is embroiled in that litigation, calling into questions issues of disclosure, confidentiality, and potential conflicts of interest.[11]

[11] To the extent the Ad Hoc Investor Group grounds its request for an examination on the fees incurred in connection with the Marina sale and litigation, an examination is clearly inappropriate. (Examiner Motion, ¶ 21). In In re Collins & Aikman Corp., 368 B.R. 623, 624 (Bankr. E.D. Mich. 2007), the United States Trustee sought appointment of an examiner after a large unsecured creditor alleged that the fees in the case were excessive, given the likely recoveries and liquidation of the debtor's assets. The court focused on section 1104(c)'s requirement that the investigation be "an investigation of the debtor," and denied the motion of the United States Trustee, ruling that the "primary investigation requested relates not to the debtors directly but rather to the conduct of the debtors' professionals . . . ." Id. at 627. Similarly, with this request, the Ad Hoc Investor Group requests an examination into the actions of the Debtors' professionals, rather than the Debtors themselves. Accordingly, this investigation is outside the scope of section 1104(c).

51. **Examination of Mr. Trump's Partnership Interest Abandonment is Inappropriate**. Perhaps most inappropriate is the Ad Hoc Investor Group's request for an examination of "Donald Trump's purported 'abandonment' of his partnership interests and the tax and other financial implications thereof for the Debtors." In support of this examination, the Ad Hoc Investor Group states without support that it "believes that Mr. Trump's purported abandonment was an attempt by Mr. Trump to insulate himself from potential tax liabilities and to shift those liabilities to the Debtors," (Examiner Motion, ¶ 31), but it provides absolutely no basis for its belief. It has not even cited to any provision of the Internal Revenue Code, or even speculated as to the basis of any potential adverse tax impact on the Debtors (and there is none). Clearly, this requested investigation is designed merely to harass Mr. Trump in a shameless effort to gain some kind of leverage in the plan process. That is bolstered by the Ad Hoc Investor Group's delay in raising the issue despite being aware of it for months.

52. Moreover, the Ad Hoc Investor Group provides no reason that an examiner is better suited to determine the Debtors' tax exposure than the Debtors and their various professionals. The Ad Hoc Investor Group also ignores that under the Debtors' Plan, this issue is entirely irrelevant because of Mr. Trump and Beal Bank's post-effective date equity interests.

53. Finally, any examination of Mr. Trump's actions relating to abandonment of his partnership interests is clearly outside the scope of section 1104(c). See In re Collins & Aikman Corp., 368 B.R. at 627 (rejecting request to appoint an examiner to investigate parties other than the debtor under section 1104(c)).

54. The Ad Hoc Investor Group has failed its burden of demonstrating that any of the examiner topics are "appropriate" for examination and brings its request in bad faith, after

unnecessary delay, and purely to interfere with the process while getting the estates to pay for its discovery needs. No examiner should be appointed.

III. THE AD HOC INVESTOR GROUP PROCEEDS IN BAD FAITH AND WITH UNCLEAN HANDS AND SHOULD BE DENIED THE RELIEF IT SEEKS.

55. The Ad Hoc Investor Group's filings are brought in bad faith by a disgruntled bidder and out-of-the-money constituency that has nothing to lose and everything to gain by creating havoc and delay in these proceedings. Because the Ad Hoc Investor Group proceeds in bad faith and with unclean hands, its should be denied the relief sought.

56. "[W]henever a party who seeks to set the judicial machinery in motion and obtain some equitable remedy has violated conscience or good faith, or other equitable principle in his prior conduct with reference to the subject in issue, the doors of equity will be shut against him notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief." General Development Corp. v. Binstein, 743 F.Supp. 1115, 1134 (D.N.J. 1990) (citations omitted).

57. Regrettably, the following ethical lapses are attributable to the Ad Hoc Investor Group:

- The Ad Hoc Investor Group appears in this Court in violation of Bankruptcy Rule 2019, which requires it to identify its members and provide information with regard to the members' holdings. The Ad Hoc Group filed a 2019 Statement on the morning of a contested hearing on its request for fees and expenses, omitting almost all required information (e.g. dates of purchase of claims, terms of acquisition, etc.). Since that date, the 2019 statement plainly has become stale, as the names on the original statement are not the same as the "Investor Group" currently represented. These omissions plainly are intentional and sufficient to deny access to the Court. Fed. R. Bankr. P. 2019.

- The Ad Hoc Investor Group continues to engage the Stroock firm notwithstanding Stroock's continued active pre-existing representation, including in pending litigation and tax matters, of entities that are directly owned and controlled by Mr. Trump, including The Trump Corporation (of which Mr. Trump is the Chairman and sole shareholder). Stroock never sought nor obtained an ethical waiver. Earlier in these

cases, anticipating a potential future dispute between Noteholders and himself, Mr. Trump informed the Stroock firm of its conflict (of which they already should have been aware) and of the firm's ethical obligations. Since then, on repeated occasions, Mr. Trump has pointed out to the Stroock firm that its conflicts of interest remain. The Stroock firm simply has denied the existence of a conflict on the specious notion -- one that finds no support under applicable law and disciplinary rules -- that representing a Trump entity does not preclude adversity against Mr. Trump individually, and now takes positions directly adverse to its own client and makes wild and unsubstantiated accusations against him.

- The Motions mislead the Court and parties in numerous ways described above, including (i) by calling the Debtors' Plan the "Insider Plan" knowing full well that neither Beal Bank nor Mr. Trump are insiders; (ii) by omitting an entire chronology of extensive negotiations among all parties, creating an utterly erroneous impression of systematic exclusion of the Ad Hoc Investor Group from plan discussions; (iii) by mischaracterizing the competing plan as "ready to go" when plainly it is not; and (iv) by neglecting to inform the Court that its plan would have the group "backstop" the purchase of 75% of the Debtors' equity, provide an egregious "fee" to the group of 20% of the equity (along with paying the group's fees and expenses), and leave non-investing Noteholders with just slightly more than nothing.

- The Ad Hoc Investor Group has acted improperly by intentionally disclosing highly confidential settlement discussions among the parties, including relating to the Marina sale. (Exclusivity Motion, ¶¶ 11, 21; Examiner Motion, ¶¶ 12, 24). The Ad Hoc Investor Group was fully aware that this information is confidential and inadmissible pursuant to Federal Rule of Evidence 408.

CONCLUSION

The Ad Hoc Investor Group plainly is not entitled to the relief it seeks. For the reasons set forth herein, the Motions should be denied, and Mr. Trump should be granted such other and further relief as is just and proper.

Dated: August 21, 2009

Respectfully submitted,

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Exhibit A

STROOCK

By Email and Mail

August 14, 2009

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Re: In re. TCI 2 Holdings, LLC, et al.; Chapter 11, Case No.: 09-13654 (JHW)

Dear Counsel:

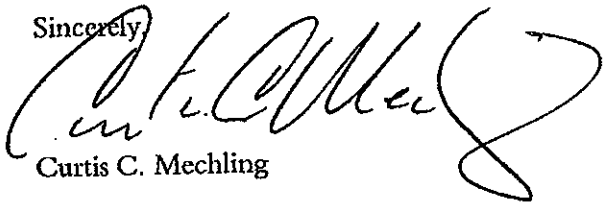
Consistent with D.N.J. LBR 9013-1(i), it is the position of the Ad Hoc Committee of Holders of 8.5% Senior Secured Notes (the "Ad Hoc Committee") that an evidentiary hearing is not required on the Ad Hoc Committee's motions to terminate exclusivity and for appointment of an examiner and, accordingly, that discovery is not needed with respect to the motions.

Without waiving the Ad Hoc Committee's objection to any request for an evidentiary hearing, and pursuant to Fed. R.B.P. 9014(e), we hereby request that you notify us by the close of business on August 17, 2009 of the names and addresses of any witnesses you may call to testify at the hearing on the motions so that the Ad Hoc Committee will have a reasonable opportunity to take their depositions in advance of the hearing.

In compliance with the Court's directive during the telephonic conference held on August 12, 2009, we are serving you today with the Ad Hoc Committee's Request for Production of Documents. We are serving this discovery request as a protective measure only. We are prepared to withdraw this document request in the event that the parties opposing the

motions agree that discovery is unnecessary and do not seek discovery from the Ad Hoc Committee.

Sincerely,



Curtis C. Mechling